



CRITICAL REFLECTIONS

From:

Roundtable on Exploring the Continuum between Sexuality and Sexual Violence

April 28, 2015



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CONCEPT NOTE FOR THE ROUNDTABLE

The past couple of years have witnessed surge of interest on issues related to sexual violence. Sweeping law reform has instated a new legal paradigm to address sexual violence. Political parties have competed in elections over who can best provide 'women's security'. Strident calls for death sentence, media attention and exemplary state action in high profile cases have come to mark the exceptionalism within which sexual violence has come to be framed. Recurring outrage and calls for censorship of sexual expression, banning books, documentaries, art and entertainment shows in the interest of honour, culture and safety of Indian women, from obscenity and indecency have continued relatively unchallenged. Sexual violence is no longer taboo subject – it has currency in elections, national media, public discourse – and is of concern to a diverse cross section of society.

Have sexuality and sexual rights been marginalized in the process of amplifying sexual violence? How do the women's rights and progressive voices continue to engage, debate and respond to events in ways that do not unintentionally strengthen and reinforce protectionist narratives, or positions that exceptionalise sexual violence, or indeed, state centric change processes. And importantly, how to does our articulation of sexual violence, not diminish or marginalize discourses that are affirming and advancing of positive/ non-normative sexuality.

Has the reliance on criminalization, law, the state, and the national media as the key vehicles of change, shrunk the spaces for dialogue, nuance, affirmative sexuality? Have our interventions/ engagement strategies, including in relation to select cases, contributed to a vocabulary where violence and victimhood dominates the conversation on sexuality. Has our discourse on sexual violence neglected the differing ways in which violence is viewed, understood and appropriated within patriarchal structures and the nation state, such that it lends itself to protectionism and censorship of sexual rights. PLD's work with counsellors, crisis centres and social workers suggests that a paradigm that focuses heavily on sexual violence, does not lend itself to affirming or defending positive sexuality. Accordingly, community groups, counsellors and courts grapple with multifarious cases of 'rape': somewhere consent is material to determination of rape, others where age or condition of marriage is the key determinant, prodding us go beyond simplistic binaries of consent and non-consent. While criminal redress is theoretically available (within the limitations of a fraught legal system), there is no easy articulation or ready defence of autonomy, desire and sexuality.

This roundtable seeks to discuss the many ways in which sexuality, sexual rights and sexual violence are inter-related, and explore the ways our strategies and framing of sexual violence has impacted positive sexuality in the current context. It seeks to critically reflect on how our reliance on criminal law and a sound bite driven media, have shrunk spaces for dialogue, reflection, uncertainties and mindful articulation of sexual violence. It seeks to explore ways of articulating and responding that do not compromise positive sexuality; or indeed, limit our ability to defend and affirm sexual rights.



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1. INTRODUCTION

This report is a summarized version of '*Critical Reflections: Exploring the Continuum between Sexuality and Sexual Violence (2015)*.' The full-length report was divided into four volumes, each covering a theme from the **Roundtable on Exploring the Continuum between Sexuality and Sexual Violence on April 28, 2015**, to explore the continuum linking concerns of positive sexuality with sexual violence.

Conversation around these themes have become necessary in the context of a considerably changed scenario following 2012, with the State, political parties, the national media and multiple stakeholders, many antithetical to positive sexuality, adopting sexual violence against women as part of their agenda. The spotlight on high profile cases, an enhanced punitive legal regime, the calls for death penalty and reduction of age of juvenility, entrenched the exceptionalised treatment of sexual violence, with scant regard for reason, principles of natural justice, or indeed affirmative sexuality. Equally, the shrill sound bite driven discourse seemed to overwhelm women's rights activism leaving little space for critical introspection on the law; or indeed, of expanding the engagement beyond state, law and media driven change, to actively forge linkages with sexuality related concerns.

In the context of this changed landscape, the roundtable sought to explore linkages between positive sexuality and sexual violence, reflecting on the dangers of a predominant focus on sexual violence, or indeed on criminalization and censorship. That the amplification of sexual violence at the cost of affirmative sexuality, and indeed positioning concerns and work in relation to these two, as being distinct, unrelated ends of a binary, rather than a continuum with interconnections that shaped the outcomes of each other. For instance, normative sexuality, or indeed, the privileging of sex in the context of romantic love and marriage, are ways by which sexuality is regulated and transgressive desires stigmatized. A primary focus on sexual violence to the neglect of more insidious ways by which sexuality is regulated eventually strengthens protectionist narratives. A feminist discourse constructed primarily around sexual violence and the penal law, without sufficiently addressing other forms of sexual control, cannot fully challenge the culture of victim blaming and selective justice – the very trends that continue to define cases of sexual violence. These concerns cut across the themes, pointing towards the need for an expansive, critical and transformatory engagement. While this

roundtable speaks to events following the 2012 protests and law reform, the concerns raised are of wider relevance.

The roundtable comprised four panel discussions on the inter-related themes relating to the law, sexuality and sexual violence. To not lose the richness and nuance of the discussions on each of the themes, the report reproduced them as truly as possible, with minimal editing, keeping intact the flow of the discussions on each of the themes. This however, made the report a substantially long one. So, in the interest of easy access and readability, we opted for creating a separate, summarized version. For the full-length version of the report, as well as a transcript of the discussions see, Critical Reflections: Exploring the Continuum between Sexuality and Sexual Violence (2015).

2. MARRIAGE, SEXUALITY AND THE LAW

These presentations explore the different ways in which sexuality, marriage and sexual violence intersect, to ask whether it is possible to carry out work on sexual violence without being an active engagement with sexuality. They drew attention to the limitations of being focused on the criminal law, or crime statistics, without engaging with women's concerns in relation to sexuality, and indeed, considering the concerns that influence the usage of the law.

Srimati Basu (Professor of Gender and Women's Studies and Anthropology, University of Kentucky) outlined the need to acknowledge that different understandings of rape exist in society, as also within feminisms and the implications of these in relation to consent and desire. While many of the understandings of rape find reflection, even if inconsistently in legal discourse, the most successful prosecutions appear to be based on cultural understandings of honour. In relation to criminal law particularly, there appears to be an intrinsic connection between rape, honour and marriage in the prosecutions as well as in the use of the law. In fact, the use of rape law in the Indian context is intrinsically connected with notions of honour, sexuality and marriage – illustrated through examples of breach of promise to marry, charges of rape by parents against their daughter's intimate male partner, and compromise of rape through offer of marriage. In this context, it is useful to ask, what is the relationship between consent and bodily integrity in different contexts? With the increasing emphasis on affirmative consent in date rapes, there is a need to ask what consent would mean in the context of marriage, when marriage itself appears to be a proxy for consent in criminal as much as in civil law; and indeed, what the meaning of marriage is in the law?

Using the campaign on marital rape as an example, Madhu Mehra (Executive Director, Partners for Law in Development) pointed to the problems with an agenda that exceptionalises penetrative sexual violence, while neglecting broader concerns of sexuality and marriage. The campaign for criminalisation of marital rape, concerns itself only with penetrative forms of sexual violence, rather than a wider range of sexual abuse or with hetero-patriarchal notions that define natural and unnatural sexual pleasure within marriage. In its calls for seeking higher punishment, it also creates a distinction and hierarchy between non-sexual forms of

domestic violence (cruelty within marriage) and rape, treating these as discrete categories. In a manner similar to patriarchy, the campaign against marital rape positions non-consensual penetrative sex as the ultimate violation inflicted on women, neglecting concerns of sexual normativity, taboos over pleasure and desire, and the range of ways by which patriarchal control over sexuality hurts women, particularly within marriage. Questioning the transformative potential for using criminalisation as the primary means of normative change, the presentation called for developing a broader sexuality agenda – that includes equipping frontline social workers to address sexuality concerns within domestic violence cases. Shifting the focus to questioning the norms related to marriage and sexuality – in law as in our lives – was proposed as a necessary step towards finding meaningful legal strategies, instead of piecemeal criminalisation of sexual violence and calls for high punishment.

Rukmini's (National Data Editor, The Hindu) presentation, based on an analysis of 600 registered cases of rape in 2013 in Delhi, compels a re-thinking of how rape law is understood – by contrasting its normative understanding with its actual usage in society. The use of rape law reveals trends in sexual agency; with law being used by young women to negotiate issues of chastity, parental control and marriage. Most significantly, the findings of this study question the simplistic reading of crime data, as is routinely done, to be a proxy for public safety. Yet, she cautioned, that the trends identified in her study only throw light on the reported case, that is to say, they only reveal the public use of rape law, not the invisible unreported trends in rape within the private domain. The invisibility of reporting and data on sexual violence in the private domain is itself of significance. The presentation underscores the value of qualitatively examining crime data, to understand the ways in which the law interacts within the social context and value systems, its social meaning beyond the reading of the statute.

The full-length version of the chapter, as well as a transcript of the discussion, can be found on our website. See, [Marriage, sexuality and the law](#).

3. SPEECH, SEXUALITY AND THE LAW

These presentations raise concerns for feminists in relation to censorship of sexist or misogynist speech – examining different grounds of censorship, some of which were invoked in the call to censor Mukesh Singh’s speech in *India’s Daughter*.

Nivedita Menon’s (Professor of Political Theory, Jawaharlal Nehru University) presentation focused on contradictions of turning to the state for regulating sexist speech, through legal categories that are intrinsically antithetical to sexual speech, and through processes that pervert feminist constructions of the problem. She referred to paradox of turning to the state to censor dominant narratives while struggling to legitimise marginalised accounts; questioning also, the claims of offensive speech and harm caused, in the absence of a unified feminist position on the matter and when no linear connection exists between representation and reception.

Shreemoyi Nandini Ghosh (Lawyer, Research Scholar, Jawaharlal Nehru University) questioned not just the grounds on which the call for censorship of Mukesh Singh’s speech (in *India’s Daughter*) was based, but also that the third party has no locus in seeking a gag order. His speech was sought to be censored on the misplaced notion of its bearing on the culpability, when the conviction was neither the subject matter of the pending appeal and when extra judicial confessions in any case are inadmissible. Flagging contradictions in feminists invoking the argument of a case being sub judice, given the history of critique of the assumptions about judicial neutrality and neutral justice on which the concept of ‘sub judice’ is based. She also cautioned against defining ‘judicial process’ to include not just trial and appeal against conviction but also all stages of appeals against the sentence, in light of the length of legal proceedings in India and its implications of silencing critiques. The presentation suggested that the call to invoke hate speech against parts of *India’s Daughter* is part of a trend of seeking exceptionally coercive approaches in criminal law to violence against women.

Siddharth Narain (Research Associate, Sarai-CSDS) was of the view that, although legal redress against hate speech is necessary, the problems with the available offences (and taking recourse to them) in the criminal law need some discussion, particularly in relation to 'offending sentiments'. The evolving comparative jurisprudence on this points to limiting the application of criminal law to hate speech that directly and proximately results in violence, or where extreme vilification is an incitement to discriminate; pointing out the value of civil law remedies and non-legal measures, including in cases of moral injury.

The full-length version of the chapter, as well as a transcript of the discussion, can be found on our website. See, [Speech, sexuality and the law](#).

4. CRIMINALISATION AND SEXUALITY

These presentations question the over-reliance on the state for social change, notably through the exceptionalisation of violence against women within the coercive criminal justice machinery.

Rahul Roy's (Filmmaker) presentation questioned whether the feminist demand for countering violence to build a just and humane society can be fulfilled by reinforcing and legitimizing coercive mechanisms of the state. Despite the lessons of the anti dowry movement's experience with the criminal law, we seem to continue to rely upon the State and its carceral power, in itself patriarchal, as the primary means of fighting patriarchy. The trajectory of the women's movement, from the early campaigns to the Justice Verma Committee, continues to emphasise criminal law reform at the cost of communitarian political transformation. The increasing emphasis on punishment, public shaming and retribution can be viewed as a reflection of caste and class positions, speaking to our location in society. With little evidence of the reformatory potential of incarceration or the translation of punishment as a deterrence to crime, along with the studies on prison sub-cultures of violence, alienation and misogyny, he called for a stronger emphasis on community interventions to attain transformation.

Mrinal Satish's (Associate Professor, National Law University) presentation also challenged the demand of harsher sentencing for rape, particularly through removal of judicial discretion in awarding less than minimum sentences. He analysed the problems with exercise of judicial discretion in sentencing in rape cases for the 30 years prior to 2013 amendment when the law permitted judges to reduce sentences below the mandatory minimum for 'adequate and special reasons'. He questioned the wisdom of limiting critiques of judicial discretion to only the problematic stereotypical grounds of virginity, marriage etc on which discretion was based, without critiquing the glaring absence of legal reasoning as the basis for sentencing. As a result of this insufficient focus, judicial discretion itself came to be viewed as a problem, done away with, and combined with higher sentencing structure. Mrinal drew attention to ways by which removal of judicial discretion, validates harsher sentencing and deterrence as a princi-

ple for bringing about change. Yet, it only allows greater acquittals, tokenist responses, while shifting exercise of discretion to more problematic agencies such as the police.

Akshay Khanna's (Research Fellow, Institute of Development Studies) presentation questions the need of feminist movement to legitimise its protests inevitably through reference to the law. Drawing parallels and distinctions with the campaign against Sec 377 by the queer movement, he drew attention to the ways in which relating with the law itself began to circumscribe the scope of the movement, and flattened its identity and organising. The concern he posed was not so much about law being one part of a protest, as it was about an obsessive focus on law and the state to validate a protest or movement. This he said, was exemplified in most feminist narratives of the post Nirbhaya moment which have been described in terms of outrage against sexual violence or with reference to the law reform, rather than as a moment, defined by the takeover of the city by the protestors. He called for an urgent and conscious withdrawal from the state, inspired by the schizophrenic character of the law, which, on the one hand, offers the promise of emancipation from marginalization, but also forces engagement strictly within the parameters of the law and legal process, which allow little room for radical politics. This sense of politics he argued, has certain similarities with coloniality and its hierarchies, privileging those who are capable of thinking in terms of justice, abstraction and interpretation of law, as opposed to lower courts who are simply implementing the law. He contrasts such movements with the more radical mobilisation in Delhi in recent times, such as the 'kiss of love' and the 'sanitary napkins' campaign, that were unencumbered by law, legal legitimacy. They re-defined protest politics by being utterly irreverent to all institutions and systems of power, including the law.

The full-length version of the chapter, as well as a transcript of the discussion, can be found on our website. See, [Criminalisation and sexuality](#).

5. FEMINIST PRACTICE AND DIALOGUE

The report on feminist praxis and dialogue considers the impact of popular and social media on feminist activism. It seeks to address the manner in which a space for dialogue, deliberation and reflection can be created, given the environment built by the media and the state, and the evolution of feminist ethics that is able to do this while affirming positive sexualities and breaking binaries.

Farah Naqvi's (Writer and Activist) presentation described the binary, 'gladiatorial' nature of public dialogue birthed by contemporary media, which seems to be straining the democratic and participatory ethic of feminist communications, both internally and externally. An environment of aggressive position-taking and quick bytes reinforces dominant voices in the public domain, but also within the feminist movement, sacrificing representation, reflection, dialogue and nuance. The 'lynch mob' mindset, which obfuscates the form of debate and its content, simultaneously generates dominant feminist positions, which homogenize the movement, deny representation and dissent, and permit the usurping of voices and distinctions within.

Jaya Sharma's (Queer feminist activist, Founding Member, Nirantar) presentation links the thread of binaries in communication and representation to the binaries between sexual pleasure and danger, which does not bear out in the lived experiences of women on sexual interaction in various contexts. An environment which does not affirm sexuality by permitting women to say 'yes' without fear of stigma will continue to trivialize their 'no' and normalize violence. A discourse on sexual violence around the fulcrum of consent will be ineffective without simultaneously challenging the codes of heteronormative desire, and the manner in which it is currently bounded with marriage.

Ayesha Kidwai's (Professor of Linguistics, Jawaharlal Nehru University) presentation spoke of the feminist ethic of 'looking forward' through three broad strokes. First, the intense engagement of the feminist movement with the law absents it from the new sites of interaction, mobilization and political action opened up by social media, which is crucial for building move-

ments. Second, a re-think on strategies for addressing sexual violence that seek to strengthen feminist institutions and processes, is necessary. Current strategies of reporting and 'shaming' make a spectacle of sexual violence, making it an expensive option for victims who get placed under scrutiny, thereby intensifying the use of sexual violence laws as a tool by the dominant. Thirdly, Ayesha suggests re-framing 'feminist' issues and subjects to encompass the routine negotiations of marginalized subjects with violence and disadvantage, which are under pressure from not only community norms but also the State.

The full-length version of the chapter, as well as a transcript of the discussion, can be found on our website. See, [Feminist Praxis and dialogue](#).